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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

COYNESS L. ENNIX, JR., M.D.,

Plaintiff,

v.

ALTA BATES SUMMIT MEDICAL CENTER,

Defendant.

CASE NO. C 07-2486 WHA

DEFENDANT'S MOTION IN LIMINE NO. 1 TO EXCLUDE COMPARATIVE EVIDENCE ABSENT A FOUNDATIONAL SHOWING OF SIMILARITY

DATE: May 19, 2008
TIME: 2:00 p.m.
DEPT: Ctrm. 9, 19th Floor
JUDGE: Hon. William H. Alsup

COMPLAINT FILED: May 9, 2007
TRIAL DATE: June 2, 2008

I. INTRODUCTION

Defendant Alta Bates Summit Medical Center ("ABSMC" or "the Hospital") hereby applies for an order *in limine* directing that Plaintiff Coyness L. Ennix ("Plaintiff"), his counsel, and witnesses be precluded from presenting evidence or argument in the presence of the jury concerning any comparison between Plaintiff and any other physician *unless* Plaintiff first makes a foundational showing of "similar situation."

II. ARGUMENT

ABSMC anticipates that Plaintiff may seek to introduce evidence comparing himself to other physicians. However, to make any such comparison meaningful, Ennix must first show that another physician is "similarly situated" to him "in all material respects." *Beck v. UFCW, Local 99*, 506 F.3d 874, 885 (9th Cir. 2007).[1] Or, as this Court has observed, that Plaintiff is comparing "apples with apples." Absent such a foundational showing, no comparison should be allowed.

Here, Defendant contends that no physician is comparable to Plaintiff in all material respects. In particular, no surgeon shares with Plaintiff the following treatment record:

Significant Problems With MIV Procedures

Early in 2004, Plaintiff performed a series of four minimally invasive valve procedures (the "MIV Procedures"). Compl., ¶ 20. Plaintiff admits to encountering problems with these new procedures. In particular, the Complaint alleges that Plaintiff "encountered issues such as prolonged procedure time, increased blood usage and conversion to the more traditional approach" during the MIV Procedures. Compl., ¶ 20.

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[1] *See also Mbadiwe v. Union Mem'l Reg'l Med. Ctr., Inc.*, 2007 U.S. Dist. LEXIS 30319, *5-*6 (W.D.N.C. Apr. 24, 2007) (applying the "similarly situated" standard to the Section 1981 claim of a minority physician who complained that his hospital privileges were restricted due to his race); *see also Vesom v. Atchison Hosp. Ass'n*, 2006 U.S. Dist. LEXIS 68576, *70-*71 (D. Kan. 2006) (same within the context of an application for reappointment and renewal privileges); *see also Mehta v. HCA Health Servs. of Fla., Inc.*, 2006 U.S. Dist. LEXIS 79536, *19 (M.D. Fla. 2006) (same concerning the termination of staff privileges).

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The "issues" consisted of excessive time in surgery and large blood usage, which ultimately resulted in death, respiratory failure or a return to surgery. Isenberg Decl., ¶ 9.

The Junod Report.

Around the same time as the MIV procedures, Dr. Isenberg received a report describing performance deficiencies with surgeries Plaintiff performed at the Alta Bates Campus in 2002 (the "Junod Report").[2] The specific concerns identified in the Junod Report involved Plaintiff's patient selection for surgery, length of operating time, clinical judgment, time on the pump (during coronary bypass procedures), intra-operative technique, and post-operative care. S. Stanten Decl., ¶ 3; Isenberg Decl., Ex. D.

The Assessment of Dr. Hon Lee.

Based on the information received by the Summit Medical Staff President (Dr. Isenberg) and the Chair of the Department of Surgery (Dr. S. Stanten), a preliminary review of the MIV Procedures was conducted by Dr. Hon Lee. S. Stanten Decl., ¶ 4; Compl., ¶ 20. Dr. Lee's assessment described "major documentation issues" with two of the MIV Procedures. S. Stanten Decl., ¶ 4. Also, Dr. Lee agreed suspending the MIV procedures after Ennix's first four failures was "a reasonable response" and that the "outcomes of these four procedures were alarming." Lee Tr. at 24:5-15. He also specifically faulted Ennix's failure to obtain the proper patient consents. Lee Tr. at 25:10-13. Dr. Lee further agreed that a reasonable person reviewing his report "might legitimately determine that there was a need for further review." Lee Tr. at 40:14-21. Hence Dr. Lee did not find the Medical Staff's action in continuing its peer review process unfair to Dr. Ennix. Lee Tr. at 38:24-39:1.

[2] The Junod Report is so named because it was prepared by an outside physician reviewer (Dr. Forrest Junod) in 2002. Isenberg Decl., ¶ 9. The Alta Bates Medical Staff provided the Junod Report to the Summit Medical Staff because of the closure of the cardiac program at Alta Bates. Isenberg Decl, ¶ 9.

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High Mortality Rates.

Additionally, in March 2004, Dr. Isenberg reviewed documents showing that Plaintiff's mortality and return to surgery rates following open heart surgery were significantly higher than his peers. Isenberg Decl., ¶ 9 & Ex. E.

The NMA Report, Which Plaintiff Concedes Is Not Racially Biased.

NMA performed a focused review of ten of Plaintiff's patient cases (the MIV Procedures and 6 bypass operations which resulted in death or substantial complications). Paxton Decl., ¶ 5 & Ex. A (Appendix A). Three major problems with Plaintiff's standard of care were identified: (1) poor judgment (leading to death in three cases, post-operative cardiac arrest in one case, and severe complications in another case); (2) substandard surgical technique (six of ten cases); and (3) "grossly substandard" documentation.[3] Paxton Decl., ¶ 5 & Ex. A (Appendix A at pp. 4-31); Isenberg Decl., ¶ 12. The NSA report concluded that "[i]f [Plaintiff's] patterns of care go uncorrected, it is likely that there will be future patient harm." *Id.* Importantly, none of the NMA reviewers knew Plaintiff's race. Unless Plaintiff can point to another doctor with a substantially similar background, any comparison is inappropriate under *Beck*, 506 F.3d at 885.

Additionally, any comparison necessarily fails because Plaintiff cannot show any identity between the decision-makers, which is also required to establish similar situation. *Id.*

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[3] NMA concluded that Plaintiff's operative notes were "grossly substandard." Paxton Decl., Ex. A (Appendix A at p. 31). The notes reviewed did not provide sufficient detail of operative findings or describe what actually happened in the operating room. Rather, his notes convey the impression that surgery was routine, when in fact, there were multiple complications and very prolonged surgery times. Paxton Decl., Ex. A (Appendix A at p. 31).

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III. CONCLUSION

In order to compare "apples with apples," Plaintiff must identify a similarly situated surgeon. If he cannot show foundational similarity, this Court should exclude any comparator evidence or argument.

DATED: April 29, 2008

Respectfully submitted,

KAUFF MCCLAIN & MCGUIRE LLP

By: _____
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4825-3137-8690.1

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

COYNESS L. ENNIX JR., M.D.,

Plaintiff,

vs.

ALTA BATES SUMMIT MEDICAL CENTER,

Defendants.

Case No. C 07-2486 WHA

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION IN LIMINE NO. 1 RE COMPARATIVE EVIDENCE

Trial Date: June 2, 2008
Dept: Ctrm. 9, 19th Floor
Judge: Hon. William H. Alsup

To make his Section 1981 case, Dr. Ennix must show that ABSMC treated him less favorably than it treated his "similarly situated" peers. "[I]ndividuals are similarly situated when they have similar jobs and display similar conduct." *Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. (Cal.) 2003). The conduct at issue in this case is Dr. Ennix's performance as a cardiac surgeon. Thus, for the purposes of the Section 1981 analysis, Dr. Ennix may compare himself with other cardiac surgeons at ABSMC who performed similar procedures and experienced similar results during the time period at issue. That he can do: as shown by the CCORP Report, Dr. Ennix's CABG mortality rate for 2003-04 was within the acceptable range,

within the State norm, and, most important to this inquiry, within the same range or better than his ABSMC cardiac surgeon peers.

As for the non-CABG cases during this time frame, *these include only the four MIV cases*, and Dr. Ennix performance on these cannot legitimately be distinguished from that of his peers. First and foremost, Dr. Hon Lee cleared those cases of patient care issues at the time. Second, Dr. Ennix performed four of the first five MIV cases performed at ABSMC, and Dr. Hon Lee recommended a Departmental review of these procedures manifestly to improve performance of *all* MIV medical staff, not just Dr. Ennix. Third, the complications Dr. Ennix encountered in some of the MIV cases are frequently encountered by Dr. Ennix's peers, as evidenced by: (a) the results of the first MIV case performed at ABSMC, by Drs. Iverson and Khan; (b) deposition testimony of Dr. Lee and Dr. Ennix's peers; and (c) data regarding the first group of MIV procedures performed by Dr. Ennix's peers.

ABSMC seeks to skirt responsibility for its disparate treatment of Dr. Ennix by casting Dr. Ennix as an outlier whose surgical performance is so different from his peers that no comparison for Section 1981 purposes is possible. But the factors ABSMC cites do not distinguish Dr. Ennix with respect to *his performance as a surgeon*. Rather, these factors distinguish Dr. Ennix with respect to *how ABSMC treated him.* It is as if ABSMC tripped Dr. Ennix, and then insisted Dr. Ennix could not compare himself to his peers because his peers did not trip. ABSMC's attempts to distinguish Dr. Ennix with respect to the MIV cases, Dr. Lee's assessment, the Junod Report, bogus mortality statistics and the NMA report all reduce to the same formula: ABSMC manipulates information to characterize it as damning to Dr. Ennix's record. ABSMC did not do that with Dr. Ennix's peers.

At trial, Dr. Ennix will present evidence that he is similarly situated to his ABSMC cardiac surgeon peers.

ARGUMENT

I. DR. ENNIX IS SIMILARLY SITUATED TO HIS PEERS.

"Evidence that one or more similarly situated individuals outside of the protected class received more favorable treatment can constitute sufficient evidence of discrimination" for a discrimination plaintiff to prevail. *Beck v. United Food and Commercial Workers Union, Local 99*, 506 F.3d 874, 883 (9th Cir. 2007) (citations omitted). "Such a showing of disparate treatment raises an inference of discrimination 'because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations.'" *Id.*; citing *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579-80 (1978) (emphasis added). "[W]hether two employees are similarly situated is ordinarily a question of fact." *Id.* at 885, n. 5. A jury may infer discriminatory motive based on comparative data involving a small number of employees when the plaintiff establishes that he or she is "similarly situated to those employees in all material respects." *Beck*, 506 F.3d at 885.

Dr. Ennix surgical record is indistinguishable from his peers at ABSMC; therefore, they are similarly situated to Dr. Ennix for purposes of Section 1981 disparate treatment analysis. At trial, Dr. Ennix will offer such evidence, specifically:

- Dr. Ennix's CABG mortality rates for the time period at issue in this case were in the same range as his peers'.
- For the reasons cited above, Dr. Ennix's record on the MIV cases is not significantly different from his peers. Further, other cardiac surgeons at ABSMC had similarly long operating times in their first few MIV cases. (See Exhibit B, document produced by ABSMC in discovery showing the "cut to close" time for MIV procedures performed by another ABSMC cardiac surgeon, identified as Physician I.)
- Dr. Ennix agreed not to perform MIV cases after the first four and before this peer review commenced. Therefore, even if there were any difference in his results from those of his peers, ABSMC could not legitimately use Dr. Ennix's MIV outcomes to justify treating him differently from his peers.

Finally, ABSMC controls virtually all the data, other than that released in the CCORP Report, which could prove Dr. Ennix's performance is in line with his peers. ABSMC vigorously opposed all Dr. Ennix's efforts to obtain data in discovery regarding the performance record of his peers, and ultimately produced very little of what Dr. Ennix sought. At trial, Dr. Ennix will use the minimal data ABSMC provided as well as testimony of its experts and Dr. Ennix's peers to demonstrate that his record is no different from his peers.

II. ABSMC's ATTEMPT TO DISTINGUISH DR. ENNIX'S RECORD MERELY HIGHLIGHTS ITS DISPARATE TREATMENT OF HIM.

ABSMC cites several factors it alleges so significantly distinguish Dr. Ennix from his peers that no comparison is possible. These are fabricated and vacuous allegations. For example:

- Alleged Problems with MIV Procedures: ABSMC seizes on Dr. Ennix's acknowledgement in the Complaint of some complications in the MIV procedures. All experts who reviewed these cases other than ABSMC's, including Drs. Lee, Reitz, Lytle, Rea, Hill and others, found no standard of care issues with these cases. And the California Medical Board found only two minor issues with these cases. Further, as discussed above, other doctors experienced similar complications in their first few MIV cases. Finally, Dr. Ennix had stopped performing MIV cases, so the results of those procedures could not justify a suspension or a concern about patient safety. Accordingly, these results do not distinguish Dr. Ennix from his peers with respect to the issues in this case.
- The Junod Report: ABSMC knew that Alta Bates had not vetted the report and had sent it to Summit with a disclaimer. (See Exhibit C.) ABSMC also knew that the Junod Report reviewed the *entire* Alta Bates campus cardiac surgery practice, not just Dr. Ennix. Dr. Ennix fought vigorously to close this program due to systemic problems inherent in low volume, problems that affected the performance of all members of the cardiac surgery team, including nurses, technicians, anesthesiologists, and cardiologists,

not just Dr. Ennix as cardiac surgeon. ABSMC knew then that maligning Dr. Ennix based on this report was irresponsible.

- The Assessment of Dr. Lee: First, meeting minutes and deposition testimony confirm that Dr. S. Stanten understood that Dr. Lee found no care issues in the MIV cases in his review. ABSMC attempts to change history now by citing to Dr. Lee's deposition testimony in this litigation. However, that testimony was not before ABSMC at the time, and so could not have justified treating Dr. Ennix differently than his peers. Additionally, while acknowledging some reason for concern about the four MIV cases, Dr. Lee stated that he "would think overall, the system of quality in peer review would have stopped at" his own review of the four MIV cases. As the attached deposition excerpt demonstrates, the word "alarming" was supplied by ABSMC's counsel, not Dr. Lee. (Exhibit A.)
- Alleged High Mortality Rates: Tellingly, ABSMC does not allege that Dr. Ennix's mortality statistics actually *were* worse than his peers, only that Dr. Isenberg "reviewed documents" allegedly showing that. If so, such documents were inconsistent with the statistics that ABSMC routinely transmits to the California Office of Statewide Health Planning and Development, which formed the basis for the CCORP Report. ABSMC's irresponsible reliance on bogus statistics when evaluating Dr. Ennix is no basis for distinguishing him from his peers.
- NMA Report: To use the NMA Report to distinguish Dr. Ennix from his peers is specious. That report resulted from a corrupt process; it is an example of disparate treatment rather than a factor that distinguished Dr. Ennix from his peers.

CONCLUSION

Dr. Ennix can and will prove at trial that he is similarly situated to his cardiac surgeon colleagues.

Respectfully submitted,

Dated: May 9, 2008

MOSCONE, EMBLIDGE & QUADRA, LLP

By: _____
Rachel J. Sater

Attorneys for Plaintiff

EXHIBIT A

EXHIBIT A

(Excerpt from Deposition of Dr. Hon Lee)

Lee page 25

Q Do you know that the officers of the medical staff placed a hiatus on the minimally invasive valve procedures after these first four were done?

A Yes. And I recall that.

Q Did you think that was a reasonable response to the outcomes?

A I think that was a reasonable response.

Q Do you agree that the outcomes of these four procedures were alarming?

A Yes. There were -- there were reason to be concerned.

Lee pages 41-42

Q Do you agree that reasonable minds, looking at the information with respect to these four cases and listening to your review, might legitimately determine that there was a need for further review?

A Review of the cases? Review --

Q Review of Dr. Ennix.

A Review of Dr. Ennix. Yes.

Q Did you think that your report had, quote/unquote, cleared Dr. Ennix and there should be no further discussion of what occurred in those four cases?

MR. EMBLIDGE: Objection. Compound.

THE WITNESS: I think that the reason we have peer review is to make sure -- to make sure our quality is -- is -- is on a practitioner level, and system level is sound. Everybody is allowed -- everybody are allowed their opinions. So I respect that.

I would think overall, the system of quality in peer review would have stopped at that. But I respect other opinions, and I respect other information that I do not have, if that issue would be pressed.

So to answer your question, I would say, essentially, this -- my opinion would be considered an expert opinion within the process. And if it was isolated to those cases, it would have stopped.

BY MS. MCCLAIN:

Q And you believe that it was not isolated to those cases?

A Because it did not stop, my conjecture is there's something that's not isolated to these cases. And it's the staff committee's prerogative to not take my opinion.

Lee pages 102-103

Q Have the other cardiothoracic surgeons that we identified --

A Yes.
Q -- practicing at Summit --
A Yes.
Q -- have they had patients who have died during or shortly after surgery?
A Yes.
Q Have they had to convert to cardiopulmonary bypass while performing coronary artery bypass procedures?
A Yes.
Q Have they had patients return to surgery for -- and I'm going to pronounce this wrong, mediastinal bleeding?
A Yes.
Q Have they had patients experience cerebral vascular accidents during or shortly after open-heart cases?

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A Yes.
Q Have they had patients experience deep sternal wound infections?
A Yes.
Q Have they had patients experience vein donor site infections shortly -- during or shortly after CAGB cases?
A Yes.
Q And have they had patients return to surgery

10 for valve-related problems?

A Yes.

EXHIBIT B

Surgery_Control_Field	COMMENT	Surgery_Date	PRBC	PLATELETS	PLASMA	CRYO	PrimaryIncision	Cut Time	Close Time	Cut to Close	Perfusion_Time	Cross_Clamp_Time	Death	Reop_Bleeding	Reop_Valve_Dysfunction	Reop_Other_NonCardiac	CVA	Morti Statu
MV+MAZE+IABP	Redo of old MV procedure	12-Sep-05	11	2	1	0	Right Ant Thoracotomy	10:34	22:51	12:17	591		1	0	0			Dead
MV + MAZE	Atrial Appendage	14-Aug-06	3	0	2	2	Right Ant Thoracotomy	9:15	18:55	9:40	291	184	0	0	0			Alive
MV ONLY		22-Sep-06	2	2	2	0	Right Ant Thoracotomy	9:40	16:00	6:20	255	179	0	0	0			Alive
MV ONLY		26-Sep-06	3	2	2	0	Right Ant Thoracotomy	8:47	15:05	6:18	175	108	0	0	0			Alive
MV ONLY		28-Sep-06	0	1	2	0	Right Ant Thoracotomy	8:13	15:25	7:12	223	192	0	0	0			Alive
MV + MAZE	Atrial Appendage	19-Oct-06	4	0	0	0	Right Ant Thoracotomy	8:56	14:22	5:26	189	84	0	0	0			Alive
MV ONLY		28-Nov-06	0	0	0	0	Right Ant Thoracotomy	8:54	13:53	4:59	138	116	0	0	0		Yes	Alive
MV	Blood utilization includes transfusion related to colon surg.	10-May-07	0	0	2	0	Right Ant Thoracotomy	8:25	13:35	5:10	173	124	0	0	0			Alive
MV ONLY		31-May-07	1	3	2	0	Right Ant Thoracotomy	9:24	14:09	4:45	210	160	0	0	0			Alive
MV ONLY		07-Jun-07	18	6	8	3	Right Ant Thoracotomy	8:28	14:30	6:02	187	117	1	0	0	Laparotomy-perforated colon. Tracheostomy.		Alive
MV ONLY		11-Jun-07	0	0	0	0	Right Ant Thoracotomy	8:55	13:29	4:34	196	131	0	0	0			Dead
MV ONLY		19-Jun-07	2	3	2	4	Right Ant Thoracotomy	8:18	12:26	4:08	165	108	0	0	0			Alive
MV ONLY	Fungal endocarditis	12-Jul-07	0	0	0	0	Right Ant Thoracotomy	8:29	12:46	4:17	162	124	0	0	0			Alive
MV + MAZE		07-Aug-07	8	4	2	0	Right Ant Thoracotomy	8:38	14:15	5:37	220	106	0	0	0			Alive
MV ONLY	4TH QTR.PEER NOT COMPLETED	20-Sep-07	4	2	4	2	Right Ant Thoracotomy	8:08	13:55	5:47	194	103	0	0	0			Alive
MV + MAZE	4TH QTR PEER NOT COMPLETED	02-Oct-07	4	3	0	0	Right Ant Thoracotomy	8:18	13:10	4:52	108	88	0	0	0	Yes		Alive
MV ONLY	4TH QTR PEER NOT COMPLETED	09-Oct-07	3	0	0	0	Right Ant Thoracotomy	8:24	12:26	4:02	164	92	0	0	0			Alive
AV+MV	4TH QTR PEER NOT COMPLETED	26-Oct-07	0	0	0	0	Right Ant Thoracotomy	8:37	12:59	4:22	149	85	0	0	0			Alive
		02-Nov-07	27	9	8	4	Right Ant Thoracotomy	8:58	13:55	4:57	230	167	0	0	0			Alive
																Laparotomy - Upper GI bleed		Alive

Physician I

EXHIBIT C

Alta Bates Summit Medical Center

A Sutter Health Affiliate

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510.204.4444

December 18, 2003

Annette Schaieb, M.D.
President, Summit Medical Staff
350 Hawthorne Ave.
Oakland, CA 94609

Dear Dr. Schaieb:

Pursuant to your request, enclosed please find a copy of the outside report of Forest Junod, M.D. relative to the cases of Coyness Ennix, M.D., which were sent for outside review by the Alta Bates Medical Staff. As we discussed, the Alta Bates Medical Staff Leadership has just recently received this report and has not had an opportunity to either carefully review it or consider it in connection with any of our own internal peer review findings. Accordingly, we make no representation regarding its accuracy, credibility or reliability. Further, we make no representation or recommendation as to what impact, if any, this report should have on Dr. Ennix's membership and privileges on either the Alta Bates Medical Staff or the Summit Medical Staff. Rather, we are simply providing it to you as information for independent review and analysis by the Summit Medical Staff. It is our view that sharing this information at this early juncture is appropriate since Dr. Ennix is now practicing at the Summit Campus of Alta Bates Summit Medical Center and is no longer actively practicing at the Alta Bates Campus.

Please note that we are providing this information in reliance on the fact that the Summit Medical Staff is a "peer review body" within the meaning of Business and Professions Code Section 805 and, further, that you will use this information solely in connection with your evaluation of the qualifications and credentials of Dr. Ennix. We expect that you will maintain the confidentiality of this information and that this document will be appropriately handled such that it will continue to enjoy all applicable privileges and immunities, including the immunity from discovery of Evidence Code Section 1157.

We hope that you will share with us any information you have or may develop in the Summit peer review process regarding Dr. Ennix. In that regard, we expect to send a request for information once we are further along in our own internal peer review process.

Thank you for your kind attention.

Sincerely,

John G. Rosenberg, M.D., M.P.H.
President, Alta Bates Medical Staff

enclosure

CONFIDENTIAL